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## Western Environmental Law Center

March 6, 2010

Re: *Kleinhans Farms Estates, LLC v. Flathead* - 8<sup>th</sup> Judicial District Court DV-08-614(B)  
Proposed Settlement Agreement

Commissioners,

Thank you again for the opportunity to comment on the proposed settlement agreement in the *Kleinhans Farms Estate, LLC v. Flathead* litigation.

My name is Sarah McMillan, I am a staff attorney in Missoula with Western Environmental Law Center and I am commenting again on behalf of Citizens for A Better Flathead. Following the March 1<sup>st</sup> public hearing addressing the proposed settlement agreement, I want to emphasize my concerns that this process of approving a subdivision through litigation is neither appropriate nor legal. It is my conclusion that subdivision by approval in a settlement runs contrary to the process for subdivision review set forth by statute, and that the strong factual record appears to readily support the Commissioners' denial of the subdivision.

As the Commissioners know, in reviewing the Commissioners' denial, the Court will not reverse "merely because the record contains inconsistent evidence or evidence that might support a different result," but will affirm unless the decision appears random or unreasonable. *Kiely Constr. v. City of Red Lodge*, 2002 MT 241, ¶69. Based on the extensive record built during the review and hearings on the subdivision, there appears to be well-supported bases for the Commissioners' denial. While a single supported reason can provide a valid basis for denial, here there were 3 strong, well-supported reasons for the denial. Montana precedent appears to support the Commissioners' denial of the subdivision and to provide a basis for summary judgment in favor of the County on the claims that are based in the subdivision laws.

Regarding Counts IV-X asserted in the Complaint (all based on 42 U.S.C. §1983), it appears there is little legal or factual support for these claims. The assertion that "the Plaintiff had a vested property right in the approval of its subdivision application" (see e.g. Complaint ¶ 108) is simply unsupported by Montana precedent. 42 U.S.C. §1983 claims cannot survive if the subdivision denial is affirmed by the Court. See *Kiely*, at ¶¶23, 45, 47 (there is no protected property interest at the preliminary plat stage; without a protected property interest, there can be no §1983 claims). Moreover, the assertion that a regulatory taking has occurred because the subdivision was denied evidences a misunderstanding of takings law. A taking has not occurred where value of property value has been diminished, or where a most profitable use has been refused. See e.g. *Kafka v. Montana Department of Fish, Wildlife & Parks*, 2008 MT 460. In *Kafka*, the Montana Supreme Court affirmed that government action that "eliminates the most profitable use" but does "not eliminate all uses" of the property does not constitute a taking.



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*Kafka*, ¶7. *Kafka* confirms that the Commissioners' denial of one subdivision proposal does not mean, as the developer has alleged, that the developer "has been deprived of any and all reasonable, productive, or economically beneficial uses" of the property. See e.g. Complaint ¶ 144.

The equal protection claims raised by the developer appear similarly weak. It appears to be based on the understanding that the County has approved subdivisions on other property with similar flood easements. However, it appears that those subdivision approvals occurred before the Commissioners were aware of the flood easement, and therefore issues about the flood easement went unconsidered in those approvals. When new information comes to light, it is not a violation of equal protection to rely on that new information in new decisions, even when earlier decisions were made without the information. Indeed, it is inconceivable that the Commissioners should ignore a newly discovered danger to the public health simply because, before the Commissioners had knowledge of the danger, they approved earlier subdivisions. Imagine for instance, a discovery that the soil was contaminated with asbestos- the fact that earlier developments had been approved in a dangerous place would not require the Commissioners to ignore new knowledge about dangers just to avoid violating equal protection. Such behavior would be in contravention of the Commissioners' duties to protect the public health, safety, and general welfare.

While the new subdivision proposed in the settlement *may* address some of the concerns that formed the basis of the Commissioners' earlier denial of the proposed subdivision, information submitted by my client, Citizens for a Better Flathead, and others at the March 1<sup>st</sup> public hearing demonstrate that the preliminary plat conditions now proposed as part of the proposed settlement agreement have been substantially changed and should be reviewed as a new proposal, with the requisite input, comment, and review by agencies, citizens and county personnel. Comments presented at the March 1<sup>st</sup> hearing present serious questions about whether the proposal will provide reasonable protection of the public health, safety and welfare. The March 1<sup>st</sup> public hearing also made clear that significant confusion exists over the final nature of new preliminary plat map proposal in the text of the proposed settlement agreement, which relies on two different exhibits (Exhibit A, and Exhibit D), and also references that the developer will further modify the plat.

Importantly, the proposed settlement will not encourage public trust in your work, in open government, and in the integrity of the County in complying with statutory procedures for land use decisions. In an attempt to better understand why the County is considering settlement of this litigation, on Friday March 5, I asked to review copies of the depositions in this litigation, but to date, I have not been provided with those documents.

In summary, the process for the approval of this new subdivision has not allowed the public to provide informed comment, nor has it allowed the Commissioners to gather all the relevant information from agencies, citizens, and personnel- information that should be used to ensure the Commissioners make an informed decision. Moreover, rather than this settlement expeditiously resolving the matter, where



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public sentiment is so strongly in opposition to this settlement agreement and the subdivision approval it includes, this settlement agreement, if approved, may simply lead to further litigation.

As recognized in the proposed settlement agreement and consent decree, the Court will need to perform its own evaluation to determine if this proposal is an appropriate resolution of the litigation, if it is “fair, reasonable, in the public interest and consistent with the goals of the Montana Subdivision and Platting Act.” (Consent Decree, Section II, p.3) If you decide to enter into this agreement, I ask that you request that the Court hold a hearing to give citizens an opportunity to inform the Court of their position on this settlement agreement. I further ask that you provide public notice of the date and time of the Court’s hearing on the proposed settlement. If you are unwilling to do this, I request that you inform me and the public immediately so that I, and/or others can ask the Court to hold such a hearing.

Sincerely,

Sarah McMillan  
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